IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-6837

FLOYD EDWARDS, Petitioner

-vs-

STATE OF OHIO, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States:

Floyd Edwards, the petitioner herein, prays that a writ of Certiorari Ohio Supreme Court entered in the above-captioned case on December 29, 1976.

OPINIONS BELOW

The decision of the Ohio Supreme Court is reported in State v. Edwards, 24 Ohio St. 2d 31, and is reproduced in the Appendix hereto, infra, pages 1-9.

The Decision and Journal Entry of the Ohio Court of Appeals, Ninth Judicial District, is unreported and is reproduced in the Appendix, hereto, infra, pages 10 thru 30. The Journal Entries of the Ohio Court of Common Pleas are unreported and are reproduced in the Appendix, hereto, infra, pages 31-38.

JURISDICTION

The decision of the Ohio Supreme Court (Appendix, infra, pages 1-9) was entered on December 29, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the Imposition and Carrying Out of Petitioner's Death Sentence Violate the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States?
2. Does the Submitting of the Petitioner to a Pre-Trial Psychiatric Evaluation to Determine the Existence of a Mitigating Factor Which Could Preclude the Imposition of the Death Penalty and Then Making that Report Available to Both the Judge and Prosecutor Violate Petitioner's Rights Under the First, Fourth, Sixth, Ninth and Fourteenth Amendments?
3. Does the Mere Recitation of Miranda Warnings to Petitioner who Has Admittedly Limited Mental Ability, Violate his Rights Under the Fifth and Sixth Amendments?
4. Did the Trial Court Deny Petitioner his Right to a Fair Trial Under the Fourteenth Amendment by Limiting the Scope of his Counsel's Summation to the Jury?
5. Did the Jury Instructions in Petitioner's Case Violate his Rights under the Due Process Clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED.

1. This case involves the First, Fourth, Fifth, Eight, and Fourteenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

1. This case also involves the following Provisions of Ohio Law Pertaining to Capital Punishment:

Ohio Rev. Code Ann. Section 2903.01 (1974). Aggravated murder.

> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Rev. Code Ann. Section 2929.02 (1974). Penalties for murder.

> (A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

Ohio Rev. Code Ann. Section 2929.03 (1974). Imposing sentence for a capital offense.

> (A) If the indictment or count in the indictment charging aggravating murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge, whether the offender is guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one ore more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined.

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by a jury.

(2) By the trial judge, if the offender was tried by a jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the argument, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise it shall impose sentence of life imprisonment on the offender.

Ohio Rev. Code Ann. Section 2929.04 (1974). Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was assassination of the president of the United States or person in line of succession to the presidency, or the governor or lieutenant governor of this state, or the president-elect or vice-president elect of the United States, or the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this divison, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist

was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of the course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance (preponderance) of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under stress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

STATEMENT OF THE CASE

Floyd Edwards, the Petitioner, was indicted by the Summit County Grand Jury for the aggravated murder, with two specifications, in violation of Ohio Revised Code Section 2929.04(A)(3) and Ohio Revised Code Section 2929.04(A)(7) and for aggravated robbery in violation of Ohio Revised Code Section 2911.01(A)(1). He was arraigned on January 17, 1975, at which time he entered a plea of not guilty to both counts.

On January 27, 1975, the trial court issued an order appointing Dr. Elliot Migdal, a psychiatrist, to conduct a psychological examination of Petitioner (Appendix [hereinafter App.] 141). Dr. Migdal met with the defendant for approximately one hour and a half on February 5, 1975. His main interest was to secure from Petitioner detailed information about Petitioner's involvement in the crimes for which he had been indicted but not yet tried. (See generally, February 25, 1975, letter of Dr. Migdal to the Court, App. at 143-145).

Subsequently, on February 12, 1977, Petitioner filed a "Motion to Restrict Use of Psychiatric Report" by which he sought to prevent the report of Dr. Migdal from being given to the prosecutor or the trial judge "unless and until" Petitioner was convicted at trial. (App. at 142). This motion was based upon Petitioner's claim that the trial court was without authority to order such an evaluation prior to trial and that the disclosure of the report to the judge and the prosecutor would be prejudicial to Petitioner.

Dr. Migdal's evaluation was contained in a letter dated February 25, 1975, and filed with the Court on February 27, 1975. (App. at 143-145). It consisted primarily of facts and analysis with respect to Petitioner's purported involvement in the robbery and death of Joseph Eschak, Jr. Dr. Migdal's ultimate conclusion was that Petitioner was not suffering form any mental deficiency.

Immediately prior to Petitioner's trial on March 5, 1975, the trial court conducted a hearing upon all oustanding motions. The first matter to be given consideration was Petitioner's February 12th Motion to Restrict access to Dr. Migdal's report. Though the transcript may be fairly read to indicate that both the trial judge and the prosecutor had, by that time, read Dr. Migdal's report (T. generally at pp. 185-187; App. at 40-42), Petitioner's motion, and the issue of prejudice to Petitioner was argued to the court. The motion was denied (T. p. 187; App. at 42.)

Subsequently, the trial court conducted a suppression hearing upon Petitioner's "Motion to Suppress Statement Made by the Defendant" (T. pp. 189-281.) Akron Police Officers Russel Cross and Harold Graig, and Petitioner, all testified with respect to the statements which the state claimed Petitioner had made to the police and the facts and circumstances out of which the statements allegedly arose. The legal issues presented to the trial court by this hearing included: whether the police officers had properly informed Petitioner of his constitutional rights as required under Miranda v. Arizona, 384 U.S. 436 (1964); whether the statements were a product of a false promise of leniency or of duress or of coercion; and the effect, if any of the fact that the state had failed to properly record one of Petitioner's statements so as to leave a gap in one of the tapes the state intended to intorduce into evidence at the trial. The trial court overruled Petitioner's Motion to Suppress, stating, in part:

> "I am finding: 1. The Miranda Warnings were given to him, he understood them. He complied with them.
> 2. I find no duress at all.
>
> As far as the missing link between the tape, its been explained to the Court's satisfaction . . ."
> (T. p. 280; App. at 50.)

Following the disposiiton of these motions the trial commenced. The Petitioner objected to the testimony of the state's first witness, Akron Police Officer Ronald Davis upon the grounds that his name had not been one of those given to defendant as a state witness when discovery was had pursuant to Rule 16 of the Ohio Rules of Criminal Procedure. (T. pp. 293-294; App. at 53-54.) This objection was overruled. (T. p. 294; App. at 54.)

In its case in chief the state was either unable or unwilling to call to the stand anyone who had actually witnessed the death of the deceased, Mr. Eschak. If the defendant's motion to suppress the evidence that resulted from his nine and one-half hour interrogation had been granted, it seems clear that the state would have had insufficient evidence to present its case to the jury.[1]

The statements made to the police, were therefore, crucial to the state's case. Those statements were obtained in this manner. In response to the information the police department received Petitioner and one Haywood Manning were picked up at 5:30 p.m. and taken to the police station in downtown Akron. (T. pp. 342-343; App. at pp. 63-64). Petitioner was held in an interrogation room from the time he was brought to the police station until approximately 3:00 a.m. the next morning. (T. p. 399; App. at p. 65). He was interviewed by police Sergeant Russell Cross at approximately 6:30 p.m. (T. p. 347; App. at p. 68.) He had a tape recorded interview with Sergeant Cross and Assistant Summit County Prosecutor Shoemaker Commencing at 8:20 p.m. (T. pp. 347, 355; App. at pp. 68, 69.) He gave a tape recorded interview from 10:00-10:15 p.m. to Detective Harold J. Craig in the presence of Haywood Manning. (T. pp. 443, 453; App. at pp. 70, 71.) At approximately

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[1] The state's independent evidence established that at 6:19 on December 28, 1974, two officers of the Akron Police Department to dispatched to investigate a possible crime at 223 Wooster Avenue, Akron, Ohio (T. p. 294; App. at p. 54), that when they arrived on the scene they discovered Mr. Eshack lying face down in the center of the store, dead (T. pp. 295-296; App. at pp. 55-56); that there was a shell casing on the floor approximately 18 to 30 inches from the body (T. p. 296; App. at p. 56); that Mr. Eshack had an enterance wound from a bullet two inches from the hairline in the middle of the back of his head, (T. p. 306; App at p. 57); that this wound was the cause of death (T. p. 411; App. at p. 58); that he was found laying on top of his glasses and hat (T. p. 307); that he had not wallet on his person, but he did have five dollars and some change in his pocket (T. p. 309; App. at p. 59); that a wallet containing some papers, bearing the decedants name was found two days later at the Akron Metropolitan Housing Authority near where petitioner stayed (T. pp. 20, 341-342; App. at pp. 61, 62-63); and that on January 9, 1975, the police department had "received word that Floyd Edwards may possibly be involved in the homicide." (T. p. 342; App at p. 63).

It should also be noted that over the objections of the defendant the state was also allowed to elecite hearsay testimony from Officer Cross concerning the out of court statements of two individuals who did not testify at trial, Haywood Manning and Butch Dubuice. (T. pp. 428-432; App. at pp. 66-68).

2:30 a.m. on the morning of January 10, 1977, Petitioner was asked to identify a gun which was discovered as a result of this questioning and which later was established to have been the murderweapon (T. p. 425.) At 2:45 a.m. on January 10, 1975, the last tape recorded statement was made (T. p. 399; App at p. 65.) Petitioner was finally booked at 5:00 a.m.

At trial the state introduced testimony and tape recordings in regard to these various statements. In sum, the state indicated that under questioning by police Petitioner stated that he and one Stanford Harris had gone to Mr. Eschak's store in order to rob him; the he, the Petitioner, had pulled a gun on the decedent; that he and the decedent had struggled over the gun and fell to the floor; that while they were struggling on the floor, Stanford Harris had come to his aid; and that since Petitioner's finger was not on the trigger when the gun went off, it must have been Stanford Harris who shot the decedent.

Under cross-examination that Detective Craig admitted that the tapes did not contain the full text of police conversations (T. p. 456) and that there were "a lot of things" that Petitioner told police which was not recorded on the tapes. (T. p. 458) Further, Sergeant Cross indicated that while the police department believed certain portions of these statements, i.e. those incriminating Petitioner, they did not believe other protions of the statements, i.e. those incriminating Stanford Harris, and consequently, though Harris was initially arrested upon this offense by the time of Petitioner's trial all charges against him had been dismissed (T. pp. 418-419.)

At the conclusion of the State's case, Petitioner moved for directed verdict on the robbery charge and both specifications to the murder charge. This motion was overruled by the Court. (T. p. 488; App. at p. 78.) Thereafter, the Petitioner rested without calling any witnesses or offering any evidence. At the conclusion of Petitioner's case, Respondent made a motion pursuant to Ohio Criminal Rule 16(B) to preclude Petitioner from commenting to the jury on the Respondent's failure to call any witness whose names appeared on the witness list the state had given to Petitioner's counsel.

This motion was granted whereby precluding Petitioner from commenting upon the fact that the state had failed to present the testimony of three people whose knowledge of allegedly relevent information concerning Petitioner's guilt or innocence was brought to the jury's attention by the state. (T. p. 497; App. at p. 70.) The Court then charged the jury, inter alia, that if a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill must be inferred from the use of said weapon (T. p. 554; App. at p. 80.) The Court also instructed the jury as a matter of law that before the jury could find the Defendant guilty of aggravated robbery, the State must prove beyond a reasonable doubt that on the 28th day of December, 1974, in Summit County, Ohio, the Defendant obtained or attempted to obtain or fled after obtaining property of some value, however small, for the purpose of depriving Joseph Eshack, Jr., of such property; and that the Defendant had a deadly weapon on or about his person; or that the Defendant inflicted serious physical harm on the person of Joseph Eshack, Jr.

During the jury deliberations, the jury requested that the Court explain the relationship between aggravated murder and the specifications. (T. p. 570; App. at p. 81.) Counsel for Petitioner objected (T. p. 578; App. at p. 82) but over this objection the Court read specification 1 and 2 to the jruy. (T. p. 581; App. at p. 84.)

The jury returned a verdict finding Petitioner guilty of aggravated murder; not guilty of specification 1; guilty of specification 2; and guilty of aggravated robbery.

After the verdict of guilty, the jury was excused, counsel for the Defendant objected to the Court permitting several jurors to take written notes during the time the Court re-read the specifications over the Defendant's objections. (T. pp. 581-582; App. at pp. 84-85.)

On March 21st, 1975, Defendant filed a motion for a new trial based

upon eleven separate grounds. The grounds relevent to this Petitioner include the following:

1. That the Court erred in allowing the State to introduce into evidence the tape recordings of statements Petitioner made to the police.

2. The Court refused to allow defense counsel to comment on fianl argument upon the State's failure to call certain witnesses.

3. The Court gave to the prosecutor a copy of Dr. Migdal's psychiatric examination of Petitioner which related information about the crimes with which the Petitioner was charged. This was ascerted to be a violation of the Fifth Amendment.

After the finding of guilty the Court ordered the Defendant examined by Dr. Abdon Villalba, a psychiatrist, and by the Summit County Diagnostic Center. On April 29, 1975, a mitigation hearing was had for the purpose of determining whether or not one of the three mitigating circumstances existed to spare the Defendant from the electric chair.

The Defendant called the Summit County Diagnostic Center psychologist Daniel Rienhold and Dr. Abdon Villalba, a psychiatrist, both selected by the Court and considered the Court's witnesses. Rienhold testified that he examined Edwards on two occasions--one being last month (March); the other was done in January (T. p. 579; App. at p. 579.) His inter-office memo which was part of his report to the Court was dated five days after the Defendant's arraignment. His report to the Court is dated March 12, 1975, five days after the jury verdict. Mr. Rienhold testified that the Defendant's full scale I.Q. was 76 (T. p. 601; App. at p. 89) and a performance I.Q. of 72. He further testified that a person with an I.Q. of 79 or less is borderline mental deficiency (T. p. 600; App. at p. 88.) Rienhold furhter testified that Edwards is lacking in mental capacity (T. p. 603-604; App. at pp. 90-91.) and that the I.Q. score of Edwards can fluctuate downward to as low as 70, (T. p. 606; App. at p. 92.) In response cross-examination by the State, (T. p. 608; App. at p. 93), Mr. Rienhold testified that to determine mental deficiency he has "to go by the I.Q. legally," and that an I.Q. score does "not necessarily" indicate a person is mentally deficient

(T. p. 611; App. at p. 94), and that Edwards if a borderline case of being mentally deficient (T. p. 612; App. at p. 95.) He further stated that Mr. Edwards is not of average intelligence (T. p. 614.) In response to a question by the Court, Rienhold said there is no straight-forward definition of mental deficiency (T. p. 615.) He stated that he goes along with Apple Creek State Hospital's definition that if a person has an I.Q. of 68 or below, he is mentally deficient.

Dr. Villalba testified he examined Edwards two times for a total of one and one half hours (T. p. 634; App. at p. 105.) He further testified that Edwards' full scale I.Q. of 76 borderlined on mental deficiency (T. 635; App. at p. 106.) Dr. Villalba further testified that, because of his mental capacity, Edwards would be less able to form the same good judgment that a person of average I.Q. could under stress (T. pp. 637, 643; App. at pp. 107, 108), and that in his opinion Edwards is on the borderline of being mentally deficient (T. p. 644; App. at p. 109.) In response to a question by the State, Dr. Villalba referred to a diagnostic manual of mental disorders and defined mental deficiency as referring to "subnormal general intellectual functioning which originates during the developmental period and is associated with impairment of either learning and social adjustment or maturation, or both" (T. p. 644; App. at p. 109.) Dr. Villalba also testified (T. pp. 648-649; App. at pp. 110-111) that Edwards in fact is mentally deficient and that Edwards' background and I.Q. would affect his ability to funciton in our society (T. p. 653; App. at p. 112.)

In addition to Mr. Rienhold and Dr. Villalba, the Defendant called a Phyllis Berthelot, who brought Petitioner's induction file and testified that Edwards failed his mental examination for entrance into the Army (T. p. 621; App. at p. 97.) She further testified that Petitioner was classified by the military as "mentally disqualified; not qualified for induction" (T. p. 620; App. at p. 96.)

Jasper Liggens testified that as Supportive Counselor to Petitioner

during part of the time Petitioner spent in the Juvenile Center, he tutored Petitioner for approximately seven weeks to try to help him pass the military exam (T. p. 699; App. at p. 131.)

Shirley Verde testified that she was a school teacher who had taught Petitioner for about two months in 1971 (T. p. 623; App. at p. 98); that she gave him tests and that in 1971 while a junior at South High School, he was reading at a second grade level (T. p. 625; App. at p. 99); and that Petitioner tried to hide the fact that he was of not normal intelligence (T. p. 626; App. at p. 100.) She further testified Edwards had difficulty understanding the English language (T. pp. 626, 627; App. at pp. 100, 101); that he was a below normal student (T. p. 629; App. at p. 102), and that she would consider him a slow learner (T. p. 626; App. at p. 102.) She also testified that she tested him for math and spelling (T. p. 630; App. at p. 103) and that he was doing second grade spelling and fourth grade math (T. p. 631; App. at p. 104.)

Susan Becker, a counselor at South High School, knew Edwards, brought Edwards' school record and testified that he graduated 187th out of 188 in his class (T. p. 656; App. at p. 114); that his I.Q. test previously given were 74 and 70 (T. p. 655; App. at p. 113) that he was classified as a slow learner (T. p. 657; App. at p. 115); and that he was placed in Educable Mentally Retarded classes (T. p. 658; App. at p. 116.)

Mr. William Nurches testified that for 25 years his specialty was slow learners, or educable mentally retarded students. He testified that Edwards tried to hide the fact that he was a slow learner and that he couldn't read (T. pp. 687, 688; App. at pp. 128, 129.) He stated that it was obvious that Edwards lacked the capacity to learn (T. p. 692; App. at p. 130.)

Edward Kirt, Chief Psychologist for the Akron Board of Education testified that the Akron Board of Education keeps file cards on students who are mentally defective (T1 p. 706; App. at p. 132) and that such a card was kept on Floyd Edwards (T. p. 707; App. at p. 133.) He further testified that a person with a low I.Q. has less than average mentality (T. p. 710;

App. at p. 134); that Petitioner's ability to learn is diminished (T. p. 710; App. at p. 134); and that Petitioner has limited mentality (T. p. 710; App. at p. 134.) He further could not testify as to the definition of mentally deficient because "it is not well defined" (T. p. 711; App. at p. 135.)

The State's witness Elliot Migdal, a psychiatrist, examined Edwards during the time Edwards was awaiting trial and while he had entered a plea of not guilty. His testimony at the mitigation hearing paralleled the letter sent to Judge Barbuto dated February 25, 1975. As in the letter, Migdal was of the opinion that Petitioner was not mentally deficient because he had tried to "manipulate" him, (T. p. 668; App. at p. 121), and was refusing to discuss "his present offense by going off on tagents regarding his past history" (App. at p. 143.) Dr. Migdal defined mental deficiency as the ability to learn with support and also to be able to obey simple commands and to be able to make somewhat adequate adjustment to society. (T. p. 664.) Dr. Migdal also testified that there was a direct correlation between I.Q. and mental deficiency (T. p. 666: App. at p. 120), and that during his examination and report he did not know Edwards I.Q. score (T. p. 669; App. at p. 122.) As a result of Migdal's pre-trial examination he was of the opinion that Petitioner was of average intelligence (T. pp. 665, 671; App. at pp. 119, 122), but he realized that he had overestimated the intelligence when he saw Dr. Rienhold's report. (T. p. 673; App. at p. 124.) Dr. Migdal also testified in his opinion a person with an I.Q. of 68 to 85 is borderline on mental retardation (T. p. 674; App. at p. 125) and that Edwards is below the average mentality (T. pp. 675, 676; App. at pp. 126, 127.)

At the conclusion of the Mitigation Hearing, the Court said the Defendant failed to prove by the preponderance of the evidence that there were mitigating circumstances to spare him from the electric chair and therefore, sentenced him to death.

A timely appeal was filed in the Ninth District Court of Appeal where twelve errors were assigned including the following which have relevance

to the within action:

"The Court erred in allowing the Prosecutor to receive a copy of Dr. Elliot Migdal's psychiatric examination prior to the trial and conviction of the Defendant."

"The Court erred in not suppressing statments made by the Defendant to the Akron Police."

"The Court erred in permitting into evidence the tape recording of the Defendant's confession with reference to the killing of the decedent."

"The Court erred in not allowing Defendant's counsel in final argument to the jury to comment that the State failed to call call two witnesses, Haywood Manning and Anita Watson, whose names frequently were mentioned in the trial by the State."

"The Court erred in its charge to the jury when it instructed the jury that the purpose to kill must (Emphasis added) be inferred from the use of said weapon."

"The Ohio Statutes with reference to aggravated murder, a capital offense, and the related sections dealing with death in the electric chair are unconstitutional for the reason that the mitigating circumstance of mental deficiency has no definition in law, is vague, ambiguous and impossible to ascertain with any degree of uniformity."

"The Ohio Statute with reference to aggravated murder and related sections dealing with death in the electric chair are unconstitutional for the reason that it does not assure the equal protection of the laws."

"The Court erred in its letter to Abdon Villaba and Elliot Migdal, psychiatrists, with reference to the Court's definition of mental deficiency."

"The Court's finding that the Defendant failed to prove that the offense of aggravated murder was not the product of mental deficiency is manifestly against the weight of the evidence."

The Court of Appeals overruled each of these assignments of error and affirmed the judgment of the trial court by its Decision and Journal Entry of November 26, 1975. (App. 10-30).

Pursuant to Article IV, Section 2 of the Ohio Constitution a timely appeal as of right was taken to the Ohio Supreme Court. By that appeal petitioner advanced essentially the same twelve assignments of error, though the wording was somewhat different. The Ohio Supreme Court found none of these propositions of law to be meritorious and on December 29, 1976 affirmed the decision of the courts below. State v. Edwards, 49 Ohio St. 2d 31 (1976) (App. 1-9).

On January 19, 1977 Petitioner obtained a stay of execution from the Ohio Supreme Court until such time as this Court should make a final determination in his case. Upon motion of the Petitioner, the time for the filing of the Petition for Writ of Certiorari was extended until May 28, 1977. (App. 138). Petitioner is now before this Honorable Court upon a Petitioner for Writ of Certiorari to the Supreme Court of the State of Ohio.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE OHIO CAPITAL PUNISHMENT STATUTES AND THE SENTENCE OF DEATH GIVEN TO PETITIONER VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

Summary of the Ohio Capital Punishment Statutes

The crime of aggravated murder, Ohio Revised Code, Section 2903.01 is a Capital offense in Ohio, for which the penalty may be life or death. The accused becomes a candidate for the ultimate penalty by being indicted by the Grand Jury for aggravated murder and one of the seven aggravating specifications provided in Ohio Revised Code 2929.04(A). Aggravated murder itself falls into two categories, either the purposeful killing of another with "prior calculation and design" or the purposeful killing of another in the course of committing any one of seven other felonies. Thus, the first category is essentially the common law offense of premeditated murder while the latter is essentially felony-murder with the additional requirement that the death be purposefully caused.

After indictment for aggravated murder with specifications, the accused is given the choice of whether first phase or guilt phase of his case shall be heard by the judge or a jury. If the defendant waives his right to a jury trial then his case is heard by a three (3) judge panel. At the conclusion of the trial, if it is a jury trial, the jury is instructed on both aggravated murder and the aggravating specifications. No mention is to be made to the jury of the penalty which may be the consequences of a guilty or not guilty verdict on any charge or specification. (Ohio Revised Code 2929.03 (B)).

The accused remains a candidate for the ultimate penalty if and only if the jury or the three judge panel unanimously returns a verdict of guilty, beyond a reasonable doubt on both aggravated murder and on aggravating specification. If a verdict of guilty on just the charge of

aggravated murder is returned, life imprisonment is imposed.

If a verdict of guilty is returned on both the charge and specification, the jury is discharged and the trial begins the second or mitigation phase of the trial.

Prior to the mitigation hearing, the Court is required to have a pre-sentence investigation and a psychiatric examination of the defendant conducted. Copies of the reports are furnished to the counsel for both the state and defense. (Ohio Revised Code 2929.03 (D)).

The purpose of the mitigation hearing is to determine the presence or absence of mitigating factors listed in Ohio Revised Code 2929.04 (B). Unless the defendant can establish by a preponderance of evidence one of the three mitigating circumstances, the death penalty is mandatory.

The mitigation hearing is tried before the trial judge or if a jury has been waived for the guilt phase of trial, the same three judge panel. At the hearing, the accused can present relevant evidence as to the mitigating factors. The accused can make a statement either under oath or not but if he makes a statement under oath he is subject to cross examination. At the conclusion of the hearing if the trial judge determines that the defendant has not met his burden in establishing one of the three mitigating circumstances, the death penalty is mandatory. In the case of three judge panel, the judges must unanimously agree that the accused has not met his burden of proof to impose the Death Penalty. No findings of fact or conclusion of law are required of the court other than a general finding of no mitigating circumstances.

B

The Ohio statutes violate Petitioner's Fourteenth Amendment rights by placing the burden of proof upon him with respect to the issue of degree of culpability and resulting punishment.

Ohio Revised Code Section 2929.03 provides that in the event an individual is indicted and convicted for aggravated murder in violation of R.C. 2903.01 and is also indicted and found guilty of one or more of the specifications set forth in Ohio Revised Code 2929.04 (A), the court shall conduct a mitigation hearing to determine whether there exist any of the three mitigating factors set forth in R.C. 2929.04(B). If the court finds that none of the mitigating factors are ". . . established by a preponderance of the evidence, it shall impose sentences of death on the offender. Otherwise it shall impose sentence of life imprisonment on the offender." R.C. 2929.03 (E).

The words of the statute plainly require a defendant to bear the burden of proving by a preponderance of evidence that he is entitled to continue to live by virtue of the existence of one or more of the mitigating factors. See State v. Woods, 48 Ohio St. 2d 127, 135 (1976); Committee Comment to R.C. 2929.03 reprinted in Page's Ohio Revised Code Ann., Title 29 (1975).

Such burden was placed upon defendant in the trial court below (T. pp. 594, 728-729, App. at 87, 136-7). Petitioner respectfully submits that the lack of any mitigating factor is, in reality, an element of the crime and that the state's requirement that he prove the existence of a mitigating circumstance by a preponderance of the evidence violates Petitioner's Fourteenth Amendment due process right to require the state to prove each and every element beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970).

Though this aspect of Ohio's death penalty has been raised on three separate occasions, only in State v. Hudson, No. 35562, (Cuy. Cty. C.A. March 17, 1977) was the existence of Mullaney v. Wilbur, supra, and a constitutional issue acknowledged.[2] The State Court of Appeals held that Mullaney was not applicable to Ohio's mitigation hearings because, ". . . the punishment aspect of a case, i.e., sentencing, is clearly distinguishable from the adjudicatory phase. . . ." State v. Hudson, supra, 8-9 (App. at 158-159).

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[2] In State v. S. Lockett, C.A. No. 7780 (Summit Cty. C.A., March 3, 1976), 15-16 (App. at 166-167) the pertinent portions of the Court of Appeals decision upon this issue were as follows:

> "Mitigation of sentence has traditionally been a defense function, and the right of leniency has has always been based upon the circumstances of the case and of the circumstances surrounding the defendant himself. . . ."
>
> "We find no conflict with the Constitution or other laws in this statutory provision governing mitigation of sentence pursuant to a separate hearing after guilt has been established. In fact, it provides an added benefit to the convicted felon."

The response of the Ohio Supreme Court was similar:

> "Appellant's argument misconstrues [sic] statutory sentencing procedures. Appellant's argument would have the state prove the proper punishment. Clearly, the introduction of mitigating circumstances has traditionally been a defense function. What appellant fails to perceive is the fact that her guilt has already been proven by the time of the mitigation stage of the proceedings. The mitigating circumstances listed in R.C. 2929.04(B) relate to the lessening of punishment and are far broader than affirmative defenses which the defense must prove in order to excuse or otherwise justify the commission of an offense."
>
> "We find no constitutional conflict in imposing the burden of proving mitigation of punishment on a defendant already adjudged guilty of the commission of a capital offense. This proposition of law is without merit."
>
> State v. S. Lockett, 49 Ohio St. 2d 48, 65-69 (1976).

This analysis might be correct if the facts developed at the mitigation hearing were to be used by the trial judge in exercising discretion to choose between different sentencing alternatives. But Ohio Revised Code Section 2929.03(E) clearly denies the trial judge any sentencing discretion. Rather, if one set of facts exists, then the trial court has no choice but to sentence the defendant to death, while if the other set of circumstances exists, the court must sentence the defendant to life imprisonment.

It is evident, therefore, that those people who commit an aggravated murder under the factual circumstances set forth in the "mitigation" portion of the statute should not receive the death penalty. Similarly, the legislature has decreed that those who commit an aggravated murder in any other circumstance should be executed. The absence of any of the circumstances set forth in the "mitigation" portion of the statute is a condition precedent for execution. As such, it is an element of the offense which the state must prove beyond a reasonable doubt.

Further, it should be noted that there is a virtual identity between the function of the "mitigating" circumstances under Ohio law which would reduce the penalty from death to life imprisonment and the existence of "provocation" in Mullaney which would make the difference between a life sentence, on the one hand, and a sentence ranging from a fine to twenty years imprisonment on the other hand. Indeed, in Mullaney the state--like the Ohio Court of Appeals--attempted to justify placing the burden of proof upon the defendant by arguing that the absence of heat of passion on sudden provocation was not a "fact necessary to constitute the crime" of felonious homicide. Rather, the state of Maine--like the state of Ohio in the case at bar--argued that the question of provocation was considered only on the issue of punishment after it was determined the accused was guilty of at least manslaughter. Mullaney at 697, n. 16.

In rejecting that argument, this Court's reasoning pointed out the infirmity that Petitioner believes exists in Ohio's statutes:

> ". . . if Winship were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect. . . . It would only be necessary to redefine the elements that comprise different crimes, characterizing them as factors that bear solely on the extent of punishment." (Emphasis added.)
> Mullaney v. Wilbur, supra at 697.

Indeed, if the position of the State of Ohio is correct, then there is no constitutional barrier to creating a single homicide offense of murder, punishable by death, and requiring those who commit what are now defined as lesser offenses, e.g., involuntary manslaughter, vehicular homicide, to prove by a preponderance that their punishment should not be death because "mitigating" circumstances exist.

Finally, since this Court held in Mullaney that our system of justice is "concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability," Mullaney at 697, 698, Petitioner reads Mullaney to apply to the case at bar even if it were assumed, arguendo, that the proof related only to punishment and not to the essential elements of the offense. For:

> "[U]nder this burden of proof, a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result. . . ." (Emphasis added.)
> Mullaney at 703.

Since "death is qualitatively different from a sentence of imprisonment . . ." and "differs more from life imprisonment than a 100-year prison term differs from one of only a year . . .," Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct.2978 , 2992 (1976), it is an intolerable situation when a person in the State of Ohio can be executed when the evidence indicates that it is "as likely as not" that that person deserves to live.

Thus, whether this burden of proof is viewed as being imposed upon the defendant as an "element of the offense," or as a standard for applying

the proper penalty, it is evident that it is being applied to the prejudice of Petitioner's constitutional rights. This error was especially grievous in Petitioner's case where the record clearly suggests that the result might have been otherwise had the burden been upon the state.

> "Needless to say, the Court was affected by the background of this boy, or this man I should say, living under the conditions that he had to live and responding the way he responded through all the conditions and the Court was sympathetic in that regard, but the Court in fair conscience could not find that there was mitigation in this case."
>
> "The Court appreciates the fact that a lot of his friends who worked with him throughout the years came and spoke on his behalf, but again the mitigation, the preponderance was not there. . . ."
> (T. pp. 728-729.)

Because of the failure of the Ohio courts to acknowledge the existence of the constitutional issue and to follow the mandate of this Court's decision in Mullaney v. Wilbur, supra, Petitioner submits that certiorari should be granted in order to properly enforce the supremacy clause of the United States Constitution.

C.

The Ohio death penalty statutes violate Petitioner's Sixth, Eighth and Fourteenth Amendment rights to a trial by a jury of his peers.

Petitioner's Sixth Amendment claim is grounded on his right to require the state to prove each and every element of the offense to a jury of his peers. As set forth more fully above, the Ohio capital punishment system requires that an individual be indicted for and convicted of aggravated murder with specifications and that he be unable to prove that he comes within one or more of the three mitigation categories before he can be sentenced to death. Under Ohio Revised Code Section 2929.03(C) the factual determination upon the existence of mitigation is taken out of the hands of the jury and ruled upon by the trial judge or a three-judge panel.

Since the absence of mitigating circumstances is one of the essential elements of the crime of aggravated murder in which the accused is sentenced to death, he is entitled to a trial by jury upon that issue.

Further, even if it is assumed, arguendo, that the factual determination relates to only an aspect of punishment and not an element of the offense, the resolution of the factual question is of such overriding importance that Petitioner is entitled to have that determination made by a jury.[3] Indeed, this Court recognized in Mullaney v. Wilbur, supra, that the determination of facts pertaining to culpability "may be of greater importance than the difference between guilt and innocence for many lesser crimes. . . ." Obviously the resolution of facts which will determine whether the petitioner lives or dies creates such a situation. See Woodson v. North Carolina, supra at 2992. Under this circumstance the right to a jury determination of these crucial facts cannot be constitutionally denied to Petitioner. See United States v. Kramer, 289 F. 2d 909 (2d Cir. 1961).

Without respect to the resolution of his Sixth Amendment claim, Petitioner submits that he has a separate and independent right under the Eighth and Fourteenth Amendments to the Constitution to have the determination of life or death made by a jury. In support of this claim, Petitioner submits the following:

First. The evolving standards of decency that are relfected by the Eighth Amendment can only find proper expression in the context of capital punishment by the existence of jury decision-making upon the issue of life or death. As this Court recognized in Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1967):

> ". . . one of the most important functions any jury can perform in making such a selection [between life imprisonment and capital punishment] is to maintain a

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[3] Mullaney v. Wilbur, 321 U.S. 684, 697, 698 (1975): "the criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability."

> link between contemporary community values and the penal system--a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society." (Citation omitted.) (Emphasis added.)

This conclusion was quoted with approval in Gregg v. Georgia, 428 U.S.153 96 S. Ct. 2909, 2929 (1976). Indeed, in Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 2986 (1976) jury decisions with respect to capital punishment were recognized as one of "the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society."

Further, in Gregg v. Georgia, supra, the jury was found to be a significant and reliable objective index of contemporary values because it is so directly involved. To allow states to exclude the jury from decision making on the issue of death would be tantamount to abandoning the "evolving standards of decency" test of the Eighth Amendment. A decision that jury participation is not required by the Eighth Amendment would thereby allow the state to effectively undermine the force of that amendment by removing one of the two "crucial indicators" of "evolving standards of decency."

Second. The guarantee of a right to a trial by jury is more than an inestimable right--it also "reflects a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

Though the authors of the Constitution sought to create a democratic government, they nevertheless adopted the Sixth Amendment with the clear intent of protecting "the accused from government oppression." Singer v. United States, 380 U.S. 24, 31 (1965). It was fully contemplated that such oppression might come from the judicial branch as well as from other branches of the government.

As this Court so clearly enunciated in Duncan v. Louisiana, supra at 156:

> "Those who wrote our constitutions knew from history and experience that it was necessary to protect against . . . judges too responsive to the voice of higher authority."
>
> * * *
>
> ". . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge."

More recently, in Taylor v. Louisiana, 419 U.S. 522, 530 (1975) one of the purposes of the jury system was recognized as being:

> ". . . to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community . . . in preference to professional or perhaps overconditioned or biased response of a judge. . . . (Citation omitted.)

Because of this fear of judicial power; because of "the belief that imposition of the death penalty ought to reflect more of a community consensus than can be marshalled by one man,"[4] and because "[t]he magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society, Marion v. Beto, 434 F. 2d 29, 32 (5th Cir. 1970), decisions upon sentencing an accused to death have historically been reserved to the legislature through mandatory sentence or the jury. Where discretion is to be exercised, jury responsibility for the imposition of the death penalty has been recognized as "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

Thus it is not surprising that when state legislatures turned from mandatory to discretionary sentencing procedures in capital cases, it was the jury, and not the trial judge, in whom the discretion was vested. See McGautha v. California 402 U.S. 183, 200 (1971).

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[4] A.B.A. Standards, Sentencing Alternatives and Procedures, commentary to § 1.1(c) [Approved Draft (1968)].

Until 1974, Ohio exemplified that trend. In 1788 the governing body of the Northwest Territory--of which Ohio was a part--enacted statutes providing for capital punishment upon conviction for treason, murder, and arson where death occurs. Upon conviction the death sentence was mandatory: neither judge nor jury had any discretion in the matter. Ch. VI, Laws Passed in the Terr. of the U.S. North-West of the River Ohio.

Though the offenses for which the death penalty was applicable were changed from time to time, the sentence of death continued to be a mandatory one until April 23, 1898. On that date, the jury was vested with the power to preclude the imposition of the death penalty upon one convicted of murder in the first degree. S.B. No. 504 [To amend section 6808 of the Revised Statutes of Ohio.] 93 Ohio Laws 223. Provisions substantially the same continued until January 1, 1974 when current provisions of the Ohio Revised Code took effect. By its provision, Judges were made the triers of fact upon the issue deciding life and death. Thus, for 186 years, no judge was ever given the power of life and death.

A survey of the applicable statutes in 1948 indicated that four states retained a mandatory death penalty; five states had abolished the death penalty, and in 39 states the choice between death and life imprisonment was left to the jury. Andres v. United States 333 U.S. 740, 767 (1948). At that time no state allowed a judge to participate in making the actual decision as to who was to live and who was to die. Similarly, a survey of the post-Furman death penalty statutes indicates that the overwhelming number of states have continued to honor the right of an accused to have the issue of death or life passed upon by a jury of his peers.[5]

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[5] Other than Ohio, it appears that only four states allow the judge to make the ultimate decision as to life and death. Ariz. Rev. Stat. §13-454 (D); Fla. Stat. Ann. §921; Mont. Rev. Code Ann. §94-5-105(1); Neb. Rev. Stat. §29-2523(2); Ohio Rev. Stat. §2929.0.

Ohio's departure from this standard seems to have been occasioned by confusion over the meaning of this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). When the legislature was making a pre-Furman comprehensive revision of the state criminal code the first version of the bill which eventually enacted provided for a jury determination of whether an individual convicted of aggravated murder would live or die.[6] This provision was retained in the substitute bill which was later introduced. Though various amendments were proposed to the substitute bill, no one attempted to vest the trial judge with any responsibility for the decision upon capital punishment.[7] This Court's decision in Furman was rendered after the substitute bill had been passed by the State House of Representatives and was pending before the State Senate Judiciary Committee.[8] It has in its efforts to conform the new provision to what it viewed as the Furman requirement that the Judiciary Committee eliminated the jury from the decision upon capital punishment.[9]

This mistake--though understandable--does not change the underlying difficulty with the statute. Both reason and history suggest that jury decision-making upon the imposition of capital punishment is a value ingrained in both the eighth and fourteenth amendments.

Because the right to a jury trial is so fundamental; because the consequences of the death penalty are so profound; and because Ohio's departure from the time-honor precluding judges from participating in the decision upon whether to impose capital punishment was initiated by confusion engendered by this Court's decision in Furman v. Georgia, supra, review by this Court is merited.

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[6] Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 Cleve. St. L. Rev. 8, 16 (1974).

[7] Id. at 17-18.

[8] Id. at 18.

[9] Id. at 20.

D

The State has established no compelling state interest which would justify depriving petitioner of his fundamental right to life.

The Massachusetts death penalty was found to be violative of that State's constitution in Commonwealth v. O'Neal, 339 N.E. 2d 676 (Mass. 1975). In his concurring opinion Chief Judge Tauro utilized state due process of law analysis which is equally susceptible to application under the due process clause of the Fourteenth Amendment.

Such analysis highlights one of the major deficiencies of Ohio's attempt to resume the practice of execution and may be summarized as follows:

The Fourteenth Amendment guarantees that states cannot deprive a person of his life without due process of law. Life is the most fundamental right of all: without it an individual would have no rights, fundamental or otherwise. In order to be sustained a statute depriving an individual of a fundamental right must be the least onerous means of furthering a compelling state interest. Thus, a death penalty statute which seeks to deprive a person of his life triggers a strict scrutiny under the compelling state interest and least restrictive means test.

The death penalty serves two principal purposes: deterence of capital crimes by prospective offenders and retribution. Gregg v. Georgia, 428 U.S. 153 , 96 S. Ct. 2909, 2930 (1976) (pluarality). While Petitioner does not dispute that society has a compelling state interest in deterence sufficient to imprison those convicted of murder, the results of empiracle studies have been inconclusive as to the deterent effect of the death penalty vis a vis imprisonment. Gregg v. Georgia, supra. There "is no convincing empiracle evidence either supporting or refuting" the view that the death penalty may not function as a significantly greater deterent force than lesser enalties." Gregg v. Georgia, supra at 2931. (footnote omitted).

Consequently under both the compelling state interest test and the least restrictive means test deterence cannot be utilized to justify the death penalty in lieu of imprisionment. Further, though retribution is not a forbidden objective, it neither requires death in order to be satisfied nor rises to the level of a compelling state interest. Thus, since the State of Ohio is unable to demonstrate any compelling state interest justifying the execution, as opposed to the incarceration of the petitioner, the Ohio statutory scheme is unconstitutional and Petitioner's sentence of execution is void.

E.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MITIGATION FACTORS LISTED IN OHIO CAPITAL PUNISHMENT STATUTE ARE UNCONSTITUTIONALLY LIMITED IN THAT:

1.

TWO OF THE THREE MITIGATING FACTORS PROVIDED IN THE CAPITAL PUNISHMENT STATUTE FAIL TO PARTICULARIZE CONSIDERATION OF THE RELEVANT ASPECTS OF THE CHARACTER AND RECORD OF EACH CONVICTED DEFENDANT BEFORE THE IMPOSITION UPON HIM OF A SENTENCE OF DEATH.

2.

THE SOLE MITIGATING FACTOR WHICH ADDRESSES THE CHARACTER AND RECORD OF THE ACCUSED IS ILLUSORY AND FAILS TO PROVIDE AN ADEQUATE STANDARD BY WHICH A DEFENDANT CAN EXCULPATE HIMSELF FROM THE DEATH PENALTY.

INTRODUCTION

Last term, this Court struck down the Death Penalty Statutes in North Carolina and Louisiana, since those states had misread this Court's opinion in Furman v. Georgia, 408 U.S. 238 (1972) by attempting to meet the requirements of the Eighth and Fourteenth Amendments by removing all sentencing discretion from the judge and jury. Woodson v. North Carolina, 428 U.S. 280, 300 (1976); Roberts v. Louisiana, 428 U.S. The Ohio Legislature, in enacting the state's death penalty statute, also misread this Court's opinion in Furman, supra, since it is clear that the legislative intent was to retain the death penalty, ". . . but to remove from the judge and jury as much discretion as possible in the punishment determination procedure."[10]

The death penalty statute enacted by the legislature provides only three mitigating factors by which a defendant who has become an

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10 Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code. 23 Cleve. St. L. Rev. 8, 20 (1974).

automatic candidate for the death penalty[11] can exculpate himself. The Ohio statute appears to be unique in relation to capital punishment statutes already reviewed by this Court last term, since in Ohio the defendant has to establish by the preponderance of evidence, one of the mitigating factors.[12] By comparison to the statutes in Florida,[13] Georgia,[14] and Texas[15] which have passed constitutional scrutiny by this Court, Ohio's mitigation factors are extremely narrow. Thus, the Ohio law does not establish "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death" (Woodson v. North Carolina, supra, at 428 U.S. 303), but for practical purposes is a mandatory death penalty.[16]

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[11] Ohio Revised Code 2929.03(D) provides that if the Defendant fails to establish one of the mitigating circumstances by a preponderance of the evidence the Court "shall impose the Penalty of Death on the offender."

[12] Ohio Revised Code 2929.04(B). The trial judge, in imposing the death penalty in Petitioner's case found that Petitioner had not met his burden of proof. This principle of the defendant's burden of proof at the mitigation hearing was affirmed in the Ohio Supreme Court opinion in State v. Sandra Lockett, 49 Ohio St. 2d 48, 66-67 (1976).

[13] The Florida statute reviewed by this Court provided seven specific mitigating circumstances, four of which are noticeably not present in the Ohio statute, such as the defendant's age, prior record, his role in the offense, and more broadly defined mental and emotional disturbances and impairments. Proffitt v. Florida, 428 U.S. 242, 248 Fn. 6 (1976); see State v. Bayless, 49 Ohio St. 2d 75 at 86-87 (1976) (for comparison of Florida statute with Ohio).

[14] As this Court noted in Gregg v. Georgia, 428 U.S. 158 (1976), the Georgia capital punishment statute allows any mitigating factor provided by law to be presented by the defendant at the sentencing trial, including youth, extent of cooperation with the police, and emotional state at the time of the crime. Gregg, supra, at 428 U.S. 197.

[15] Although the Texas statute did not delineate a mitigating circumstance, this Court recognized by case law that the defendant could present any mitigating factor at his sentencing trial, including age, mental and emotional state, and lack of prior criminal record. Jurek v. Texas, 428 U.S. 262, 273 (1976).

[16] The Ohio Supreme Court has reviewed 20 post-Furman death sentences and reduced none.

1.

TWO OF THE THREE MITIGATING FACTORS PROVIDED IN THE CAPITAL PUNISHMENT STATUTE FAIL TO PARTICULARIZE CONSIDERATION OF THE RELEVANT ASPECTS OF THE CHARACTER AND RECORD OF EACH CONVICTED DEFENDANT BEFORE THE IMPOSITION UPON HIM OF A SENTENCE OF DEATH.

At the mitigation stage of the trial, the death penalty is mandated unless the defendant convicted of aggravated murder with specifications proves one of the following factors by a preponderance of the evidence:

> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.
>
> Ohio Rev. Code 2929.04(B).

On its face, the statute only meets the constitutional requirement of "particularized considerations of relevant aspects of the character and record of each defendant before the imposition upon him of a sentence of death" in criteria three. Woodson v. North Carolina, supra, at 303. As to mitigating factor (1), the conduct of the victim in facilitating his own death, clearly the character and record of the defendant has no relevance.

While the defendant's background is relevant to considering the concepts in mitigating circumstance (2) of duress, coercion[17] and strong

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[17] The issue of duress and coercion has arisen in two cases, State v. Woods, 48 Ohio St. 2d 127 (1976), and State v. Bell, 48 Ohio St. 2d 270 (1976). In Woods, supra, the court gave an admittedly broad definition of duress and coercion in application, however, the court appeared to overlook its own definition. In Woods, the defendant had no prior record, was easily led, and was dominated by others, especially his co-defendant, Reaves, who had planned the actual robbery. Since Woods did not abandon his criminal conduct before the shooting (in which case he would have escaped capital punishment altogether) the court did not reduce his sentence. By the same token, in Bell, supra, the court refused to reduce the defendant's sentence although he was only 16, and also easily led by his adult companion, Hall. Since he had not abandoned his criminal conduct after the crime was committed. Bell, supra, 48 Ohio St. 2d 282. Both these cases are examples of Ohio Supreme Court's refusal to judge "individual culpability" of each defendant instead of reviewing on the basis of the "category of the crime committed." See Roberts v. Louisiana, supra, 428 U.S. at 222.

provocation[18] its application to the class of death penalty candidates has so far been extremely limited and almost non-existent.

2.

THE SOLE MITIGATING FACTOR WHICH ADDRESSES THE CHARACTER AND RECORD OF THE ACCUSED IS ILLUSORY AND FAILS TO PROVIDE AN ADEQUATE STANDARD BY WHICH A DEFENDANT CAN EXCULPATE HIMSELF FROM THE DEATH PENALTY.

The sole mitigating factor which allows the consideration of defendant's background and character is subsection (3) of 2929.04, which allows the defendant to prove that the crime was "primarily the product of" his "psychosis or mental deficiency." Since a "psychotic" offender, in all probability would not be found criminally responsible for his actions, in practice, the consideration of the accused's life and character will turn on the interpretation of "mental deficiency."

The phrase "mental deficiency" in psychiatric terms has been synonomous with mental retardation. The first death penalty case decided by the Ohio Supreme Court, State v. Bayless, 48 Ohio St. 2d 73 (1976) adopted this

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18 The mitigating factor that "it is unlikely that the offense would have been committed but for the fact that the offender was under . . . strong provocation," Ohio Rev. Code 2929.04(B)(2) has not been an issue in any of the twenty (20) capital cases reviewed by the Ohio Supreme Court. The above section is for all intents and purposes identical to the Ohio Criminal Code definition of voluntary manslaughter:

> "No person while under extreme emotional stress brought on by serious provocation reasonably sufficeient to incite him into using deadly force, shall knowingly cause the death of another."
> (Emphasis added.)
> Ohio Rev. Code §2903.03

Thus a defendant in Ohio who kills his victim under serious or strong provodation sufficient to raise a reasonable doubt to the jury would be guilty of voluntary manslaughter and would not be subject to the death penalty. Alternatively, if the defendant was unable to convince the trier of fact at trial that he acted under strong provocation sufficient to raise even a reasonable doubt, it is doubtful if he could convince the trial judge by a preponderance of the evidence at his mitigation hearing. Therefore the availability of this mitigating factor is at best speculative.

interpretation.[19] Relying on this definition, Petitioner established at his mitigation hearing that he is a borderline mentally retarded, has the education equivalent to a child in the second grade, and that as a result of his mentality he cannot be expected to form the same good judgment as a normal person, especially under stress.

The Supreme Court held, however, that Petitioner was not a mental deficient, even though he has an IQ of 76 with a performance IQ of 71. Further, Petitioner's educational deficiencies were not relevant to considering whether he was mentally deficient. To emphasize the type of appellate review done in reviewing the mitigation hearings and death sentences of Ohio defendants, the Supreme Court held:

> "In criminal appeals, court will not retry issues of fact. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered.". (Emphasis added.)[20]
> Edwards, supra, at 47.

After Petitioner's case was affirmed, possibly in concern over the scrutiny this Honorable Court would place on the narrowness of the statutory mitigating factors, the Supreme Court of Ohio enlarged the definition of "mental deficiency." The new interpretation of "mental deficiency" became:

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[19] Justice Stern, speaking for the court, held:

> "Mental deficiency is consistently defined to mean low or defective state of intelligence."
> State v. Bayless, supra at 95-96.

Notably one justice, Justice Hebert did not concur in this definition. Bayless, supra, at 112.

[20] The above statement typifies the type of blatant disregard by the Ohio Supreme Court for constitutional mandated appellate review in death penalty cases:

> ". . . to determine independently whether the imposition of the ultimate penalty is warranted . . . and to ensure that they [the death sentences] are consistent with other sentences imposed in similar circumstances."
> Proffitt v. Florida, supra, at 253.

". . . Any mental state or incapacity may be considered in light of all the circumstances and including the nature of the crime itself. . . ."
State v. Black, 48 Ohio St. 2d 262, 269 (1976).[21]

This reinterpretation, Petitioner submits, is cosmetic only since to date neither he nor any other defendant sentenced to death has demonstrated sufficiently to the Supreme Court of Ohio that they are mentally deficient and that the crime was primarily a product of that deficiency.[22]

The accused in Ohio convicted of aggravated murder with specifications have the burden of proof in establishing mitigating factors such as "mental deficiency" but as of yet such factors have not been adequately explained by the highest court in the state. Surely a defendant facing a death sentence is entitled to the same constitutional due process rights of adequate notice and definitive standards in statutory wording as an accused faced with any type of criminal charges, to safeguard against "arbitrarily and discriminatory application" of criminal statutes. Graynod v. City of Rockford, 408 U.S. 104 at 108-109 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971). Based on the conscious failure of the Ohio Supreme Court to provide a standard for mitigating circumstances, the Ohio death penalty statute is inherently vague and the ability of the accused to avoid the death penalty is illusory.

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[21] Interestingly, three justices of the Supreme Court, (Justices Stern, Celebrezze and W. Brown), while concurring in the judgment in Black, supra, did not concur in the interpretation of "mental deficient," evidencing a division of the court as to the meaning of mental deficient.

[22] In these cases no mitigation of mental deficiency was found: State v. Harris, 48 Ohio St. 2d 351 (1976) (defendant was seventeen, a sociopath, had low intelligence and an IQ of 72); State v. Royster, 48 Ohio St. 381 (1976) (defendant had an "IQ of 75 in 1962; 61 in 1966 and 54 in 1968," Id. at 389); State v. Lockett, 49 Ohio St. 2d 48 (defendant had below average intelligence and was under the influence of methodone); State v. Bell, 48 Ohio St. 2d 270 (1976) (defendant was 16 years old and unable to cope with demands of the educational system).

F.

The Ohio Courts have failed to properly review Ohio's death penalty cases.

> "It is now clear that the sentencing process as well as the trial itself, must satisfy the requirements of the Due Process Clause."
> Gardner v. Florida, __ U.S. __ , 20 Cr. L. 3083, 3085 (March 22, 1977).

Plenary appellate review of death sentences serves as an "important additional safeguard against arbitrariness and caprice." Gregg v. Gregg, supra, at 2937. The cases of Gregg, Proffitt, Jurek, Woodson, and Roberts have been held to require "meaningful appellate review designed to determine whether the imposition of the death penalty is warranted in any given cases." Jackson v. Mississippi, No. 49, 178, p. 21 (Mississippi Supr. Ct. 1976), 337 So. 2d 1242, 1255 (Miss. 1976).

In Ohio a person sentenced to death has an appeal as of right to the Ohio Supreme Court. Section 2, Article IV, Ohio Constitution. But, as demonstrated below, the system of appellate review in the state of Ohio cannot pass constitutional muster.

First. There must be an adequate trial record in order to allow for effective review. Even in civil litigation the parties are assured of receiving findings of fact and conclusions of law. Ohio Civil Rule 52. And in the context of a criminal proceeding, it has been held that trial courts should make specific findings of fact to support rulings upon suppression motions, United States v. Gusan, 549 F. 2d 15 (7th Cir. 1977); that such findings are always advisable with respect to the reasons for rendering a particular sentence, United States v. Carden, 428 F. 2d 1116, 1118 (8th Cir. 1970); and that in state speedy trial proceedings "sufficient facts and reasons be set forth in the record to support the court's decision." State v. Messenger, 49 Ohio App. 2d 341 (1976). Indeed, as was said in Gardner v. Florida, — U.S. __ , 20 Cr. L. 3083 (March 22, 1977):

". . . Since the State must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, ___ U.S. ___, No. 75-506 (July 2, 1976) Slip op., at 7-9, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia." (Footnote omitted.)

But the Ohio trial courts continuously fail to make detailed findings necessary for effective appellate review. In Petitioner's case, for example, the April 1975 Journal Entry speaks to this issue only to this extent:

"The Court having heard testimony in the matter presented on April 29, 1975, and upon due consideration hereof, finds that there are no mitigating circumstances present."
(App. 34).

Similarly, the transcript of the mitigation hearing contains only the Court's ultimate conclusions and nothing that can be said to even approach specific findings of fact. [23] In an effort to demonstrate to the Court that this

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[23] That portion of the transcript reads as follows:

COURT: The Court has reviewed all the testimony pertaining to mitigation; has reviewed the reports as well as the statement made by the witnesses that appeared on his behalf; the Court has read the Pre-Sentence Report. The Court, in reviewing the case finds that the preponderance of the evidence does not in this particular case, as far as mitigation is concerned the Court found that the aggravated murder of Joseph Eschack was not the product of the offender's psychosis or mental deficiency, and therefore finds no mitigation to consider in this particular case.

Needless to say, the Court was affected by the background of this boy, or this man I should say, living under the conditions that he had to live and responding the way he responded through all the conditions and the Court was sympathetic in that regard, but the Court in fair conscience could not find that there was mitigation in this case.

The Court appreciates the fact that a lot of his friends who worked with him throughout the years came and spoke on his behalf, but again the mitigation, (continued p.40)

deficiency in the articulation of facts is not a problem limited only to Petitioner, there is set forth in the Appendix relevant journal entries and transcript pages from State v. Hines, No. 5302 (CP Ashland County) and State v. Perryman, No. 75-3-436 (CP Summit County). (App. 170-179).

In matters as important as these a defendant has a right to the specific finding of facts that underlie the Court's ultimate resolution of the question of mitigation. Any lesser standard violates due process.

Second. The Ohio Supreme Court itself has shown an indifferent regard for integrity of the record upon which review predicated. In State v. Woods, 48 Ohio St. 2d 127, 134 n. 3 (1976) the Court noted:

> "One difficulty in considering the claims for mitigation in this case is that the pre-sentence report required to be made by statute does not appear in the record. This court bears a special responsibility in capital cases to assure that the ultimate penalty of death be imposed fairly and consistently, and that responsibility requires that we independently evaluate the evidence of aggravation and mitigation upon which each death sentence is based. For that reason, pre-sentence reports and other information relevant to the appropriateness of the death sentence should properly be included in the record of each case brought to this court as a matter of right because the appellant's sentence of death has been affirmed by the Court of Appeals."

In spite of this deficiency and in spite of its power to supplement the record by ordering the report to be deposited with the Court, e.g. State v. Roberts, 50 Ohio App. 2d 237, 251 (1977), the Ohio Supreme Court proceeded to analyze the merits and affirm the conviction without the availability of the reports.

Third. At least with respect to Petitioner's case, the Court below has demonstrated that it did not examine the record with the type of serious scrutiny that should be given to a case which may result in the death.

As set forth more fully, beginning at page 47 , infra, the Ohio Supreme Court erroneously concluded that a psychiatric evaluation ordered by

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> (continued) the preponderance was not there and the Court felt that you, Mr. Chuparkoff, have done an excellent job in presenting his side of the case, both during the trial and through the mitigation. The Court knows the burden that was placed upon you, as well as the State.
>
> Now, it's my duty to sentence Mr. Edwards.

the trial court was for purposes of determining competency when a close examination of the record would have clearly revealed that the psychiatrist was asked to, and did in fact, examine Petitioner with respect to one of the mitigating factors which, if established, would preclude imposition of the death penalty.

The Court made a similar mistake with regard to the identity of one Mack Newberry. In attempting to justify the decision of the trial court in allowing officer Ronald Davis to testify for the state, even though his name did not appear on the witness list, the Ohio Supreme Court stated:

> "Although the witness list was incomplete, it did include the name of Mack Newberry, the partner of Ronald Davis, who accompanied him on his tour of duty. It was the intention of the state to call Newberry as its first witness, but a heart attack the night before trial precluded his appearance, and Davis was called in his stead."
>
> State v. Edwards, 49 Ohio St. 2d 31, 42 (1976).

The transcript clearly shows that Newberry was an individual who lived in the neighborhood where the victim died (T. pp. 293, 341). Contrary to the conclusion of the court below, Mr. Newberry was a black male, 77 years of age, who was neither a policeman or the partner of officer Ronald Davis (App. p. 184).

Fourth. Of equal concern is the likelihood that the court below did not devote any serious attention to the briefs prepared by counsel. The mistake with respect to Mr. Newberry was also one which the Court of Appeals had initially made. Upon appeal to the Ohio Supreme Court, counsel for the Petitioner pointed this error out in his brief and cited transcript pages which were relevant to that, explaining to the Court that Mr. Newberry was not a police officer. In spite of this effort, the error was republished in the Ohio Supreme Court's opinion. (App. 181-182).

Fifth. In State v. Bayless, 48 Ohio St. 2d 73, 86 (1976) the court below indicated that it had:

> ". . . a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." (Emphasis added.)

See also State v. Woods, 48 Ohio St. 2d 127, 134 n. 3 (1976) and State v. Strodes, 48 Ohio St. 2d 113, 117 (1976).

In spite of this commitment to "independent review" it is worthy of note that as of this date the lower court has not reversed a single case nor reduced a single sentence as a result of its independent review.

Further, it is evident that by "independent" review the Ohio Court does not mean a plenary weighing of the sentencing factors as is done in Florida, E.g., Swan v. State, 322 So. 2d 485, 489 (Fla. 1975). Indeed, when Petitioner sought to have that court consider the evidence upon the issue of mental deficiency, the Court responded thusly:

> "In criminal appeals, this court will not retry issues of fact. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered. From the evidence before it, the trial court had more than sufficient evidence to support its judgment. (Emphasis added.) (Citation omitted.)
> State v. Edwards, supra at 47.

Since this is the same standard that is applied to all criminal cases, the Court's "independent review" seems to be illusory.

Other deficiencies in the review Ohio accords to those sentenced to death are set forth above in division "E" which discusses the Court's treatment of the mitigating factors. Further examples can be expected to be presented on an individual basis as the remaining petitions for certiorari are filed. But Petitioner believes that the foregoing is sufficient to indicate that the Ohio Courts had not taken their duty to review capital cases as seriously as they are required to.

Because the Ohio Courts have not adhered to the high standards of appellate review as Florida, Georgia, and Texas have, the judgment of this Honorable Court is necessary to set forth the constitutional boundaries within which state appellate courts must function when reviewing capital cases.

G.

Ohio capital sentencing procedures impermissibly penalize exercise of the right to trial by jury.

Petitioner submits that the Ohio statutory scheme improperly and unnecessarily penalized the exercise of this right to trial by jury and concurs fully in the apt argument of the law upon this issue submitted by the petitioner in Carl L. Bayless v. State of Ohio, Petition for Writ of Certiorari (pending):

"United States v. Jackson, 390 U.S. 570 (1968) stands for the proposition that the right to a jury trial is unconstitutionally diminished when separate and more lenient sentencing standards are established for cases in which the right is waived. See also, Funicello v. New Jersey, 403 U.S. 948 (1911) (per curiam); Atkinson v. North Carolina, 403 U.S. 948 (1971) (per curiam). This is so because such a scheme "needlessly encourages" the waiver of the right to have one's guilt determined by a jury. Id. at 588. Yet, under Ohio capital sentencing procedures the defendant who elects to be tried by a jury must forego the benefit of having his fate determined by a panel of judges rather than by a single judge. This benefit is, of course, considerable:

> 'A multi-judge court offers an opportunity for disagreement wholly lacking in a single judge. With such an issue as the death penalty involved, the possibility and vailability of disagreement are advantages that cannot be disregarded. The fact that a single judge may be reluctant to assume the awesome solitary choice between life and death cannot weigh in the balance. Judges are presumed to have the fortitude to carry out their responsibilities.'

Rainsburger v. Foglaine, 380 F. 2d 783, 785 (C.A. 9, 1967). And, since there is no justification for conferring the benefit upon some, but not all capital defendants, it can not legitimately serve as an inducement to forego trial by a jury of one's peers."

H.

The Ohio statutory scheme for capital punishment contains a substantial risk that capital punishment will be inflicted in an arbitrary and capricious manner.

Initially, Petitioner contends that the Ohio statutory scheme is arbitrary and capricious. This is so because the legislature has provided that a murder which results from prior calculation and design is aggravated murder without any specification and consequently without any risk of receiving the death penalty. Compare Ohio Revised Code sections 2903.01(A) and 2929.04. At the same time, the Ohio Legislature mandated that those whose actions take the life of another during the commission of a felony (similar to the common law murder-felony rule) have committed aggravated murder with a specification and consequently may be subjected to the death penalty unless mitigating circumstances are proven by a preponderance. Ohio Revised Code sections 2903.01(B) and 2929.04(A)(7). The Ohio statutes thereby operate to preclude from capital punishment the perpetrator of the most premeditated and heinous murder, and at the same time to create a presumption of capital punishment for even the most accidental and unintended death which occurs during the commission of a felony. Similarly, the Ohio statutes dealing with the death penalty for felony-murder admit to no particularized consideration of the culpability of the individual when more than one party is involved. It blindly mandates the death penalty for principals and aider and abettor alike, without any regard to their actual knowledge, participation or culpability in the death. E.g., State v. Lockett, 49 Ohio St. 2d 48 (1976).

Petitioner submits that the Ohio Legislature has not merely allowed, but rather had mandated the use of capital punishment in an arbitrary and capricious manner.

Further, the statutory system is suspect of being applied in an arbitrary and capricious manner.

First. In Ohio, as in most states, the prosecutor has tremendous discretion in determining both the ultimate charge against the accused and in plea bargaining. Obviously, such discretion encompasses the opportunity for both good faith mistakes and for abuse. The possible constitutional problem with such a system were briefed before this Court in the last two terms. See Fowler v. North Carolina, No. 73-7031, Brief for Petitioner, pp. 45-61; Woodson v. North Carolina, No. 75-5491, Brief for Petitioners, pp. 28-32; Gregg v. Georgia, No. 74-6257, Brief for Petitioner, pp. 18-20; Jurek v. Texas, No. 75-5394, Brief for Petitioner, pp. 29-40.

Though the existence of such discretion alone is not enough to demonstrate a constitutional infirmity, e.g., Gregg v. Georgia, supra, at 2937, Petitioner submits that if empirical data were available which demonstrate that through the exercise of such discretion or its abuse, those individuals who were given the death penalty were selected in an irrational, arbitrary, or capricious manner, then the death penalty of this state would be unconstitutional under this Court's decision in Furman v. Georgia, supra.

The Ohio Department of Mental Health and Mental Retardation keeps detailed statistics upon each Ohio criminal case which traces the history of each case from indictment through disposition and contains other relevant information with respect to age, sex, and race of each defendant. A copy of the form used to collect this data is reproduced in the Appendix at page 180. Though such documents are Public Records to which Petitioner has an absolute right of access. See Ohio Revised Code Section 149.43, as of the date of the preparation of this petition he has been unable to convince that

agency of the state to allow him access to such information. Nevertheless, Petitioner will obtain that data either by agreement or mandamus. Based upon partial statistics that Petitioner has gathered through the cooperation of the courts in sixty of Ohio's eighty-eight counties, Petitioner submits, upon information and belief, that the more complete and reliable statistics in the possession of the State of Ohio would be relevant to whether or not Ohio's statutory system of capital punishment is being utilized in an arbitrary and capricious fashion.

Second. There have been instances where a death sentence has not been imposed because a mitigating circumstance was found. Given the illusory nature of the mitigation portions of the Ohio statute as discussed above, this raises the question of whether judges in the state of Ohio are acting in such a manner as to make the death penalty in Ohio one that is arbitrary and capriciously imposed. This can be easily ascertained by reference to the transcripts once those mitigated cases are identified through the information in the possession of the Ohio Department of Mental Health.

Accordingly, Petitioner asks that this Court consider the fact that the Ohio statute itself mandates arbitrary and capricious infliction of death and to evaluate statistical data concerning Ohio's current statutory scheme in order to determine whether that penalty is being applied in an arbitrary or capricious manner.

II.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ACTION OF THE STATE TRIAL COURT IN REQUIRING PETITIONER TO SUBMIT TO A PRE-TRIAL PSYCHIATRIC EVALUATION WITH RESPECT TO A MITIGATING FACTOR WHOSE EXISTENCE COULD PRECLUDE THE IMPOSITION OF THE DEATH PENALTY AND MAKING SUCH REPORT AVAILABLE TO BOTH THE JUDGE AND THE PROSECUTOR VIOLATES PETITIONER'S RIGHTS UNDER THE FIRST, FOURTH, SIXTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Prior to commencement of Petitioner's trial, the state trial judge ordered Petitioner to submit to a psychiatric evaluation (App. at 141). Though the Ohio Supreme Court concluded that this was "apparently" an examination under Ohio Revised Code Section R.C.2945.37 to determine whether or not Petitioner was competent to st and trial, [24] State v. Edwards, 49 Ohio St. 31, 36 (1976) (App. at p. 4.) an examination of the record clearly and unmistakably reveals that this evaluation was for purposes of determining whether or not Petitioner should be sentenced to death in the event of his conviction. The facts demonstrating that this pre-trial psychiatric evaluation was in fact taken for the purpose of considering whether the mitigating circumstances of mental deficiency existed include the following:

(1) The Court's January 28, 1975 letter to Dr. Elliot Migdal, the examining psychiatrist, fails to make any mention of Ohio Revised Code Section 2945.37 or to ask Dr. Migdal to evaluate Petitioner's competency to stand

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[24] There are only two weak references in the record upon which the Ohio Supreme Court's conclusion could have been based:

(1) After defense objections to the evaluations the state prosecutor, while admitting that he didn't know why the evaluation was conducted, suggested that it might be justified as an inquiry into competency (T. 185-186; App.40-41) at

(2) The trial court, apparently speaking of its general procedure in capital cases, indicated that he had psychiatric evaluation conducted prior to trial "to determine whether or not this person should stand trial, at least to get an insight into this particular person. . . ." (T. 184; App. at 39).

In evaluating the claim that this evaluation was for purposes of determining Petitioner's competency to stand trial it is noteworthy that the record is devoid of any suggestion that Petitioner was not competent to stand trial and no hearing was ever had upon the issue of competency.

trial. To the contrary, the trial judge told Dr. Migdal that he had been appointed to examine petitioner "as to his mental condition;" citing Ohio Revised Code Sections 2929.03(D) and 2947.06 pertaining to the death penalty and "mental deficiency" as a mitigating factor; and instructed Dr. Migdal that:

> "The one question to be considered in this case is whether or not the Defendant has a mental deficiency."
> Letter to Dr. Elliot Migdal, filed January 28, 1975
> (App. at 139-140)

(2) The content of the letter sent to Dr. Migdal for this pre-trial evaluation is identical to the letter sent to Dr. Abdon Villalba for the post-conviction psychiatric evaluation required under Ohio Revised Code Section 2929.03(D). (Compare App. at 139-140 with App. at 149-150).

(3) Dr. Migdal's letter to the Court dated February 12, 1975 fails to address the issue of competency to stand trial, but rather considers the question of the existence of the mitigating factor of mental deficiency and includes standard pre-sentence report information concerning Petitioner's background and the offense in question. Compare Rule 32.2(B) of the Ohio Rules of Criminal Procedure; Rule 32(C) of the Federal Rules of Criminal Procedure. This record admits to no other conclusion but that this evaluation was, in both form and function, a presentence or mitigation hearing report.

Pursuant to the Journal Entry of February 4, 1975, (App. at Dr. Migdal interviewed the Petitioner at the Summit County Jail on February 5, 1975. An examination of Dr. Migdal's letter reporting the results of that interview indicates that he not only gained information concerning the Petitioner and his background, but that he also elicited details of the events

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Petitioner does not believe that the label given to the doctor's letter is of any constitutional significance. As the Ninth Circuit concluded in United States v. Montecalvo, 553 F. 2d 1110, 1112 (9th Cir. 1976):

> "The label on the file has no significance. The content of the file is what counts. . . ."
>
> "The term presentence report . . . is not a term of art. It is a shorthand expression intended to encompass any report that contains the kind of information described in Rule 32(C)(2) . . . ." (Footnote omitted.)

in connection with the crime with which Petitioner was charged. Indeed, more than half of Dr. Migdal's letter of some three pages is devoted to a recitation of the details concerning the shooting and his analysis of the inferences that could be drawn from the information Petitioner related to him.

Subsequently, on February 12, 1975, counsel for the Petitioner filed a "Motion to Restrict Use of Psychiatric Report." By that motion Petitioner argued that the court did not have the authority to order such an examination prior to conviction and that such report would be prejudicial to his rights if it were made available to the prosecutor and to the court. Consequently, Petitioner asked that the report not be made available to either the court or the prosecutor, "unless and until defendant has been found guilty of the crime of aggravated murder," (App. at 142) The record fails to disclose that any hearing was held upon this motion until March 5, 1975. At that time it is evident from a reading of the transcript that the report had already been given to both the prosecutor and the court. The trial court held that in spite of Petitioner's objection, there was no error, and overruled Petitioner's motion in that regard (T. 187; App. at 42).

Petitioner respectfully submits that the action of the trial court in compelling him to submit to such a psychiatric examination prior to conviction and making its results available not only to the court but also to the prosecutor violated his rights to due process of law. The fundamental unfairness of making such information available to either the judge or the state prosecutor is demonstrated by reference to the A.B.A. Standard and the Federal Rules of Criminal Procedure. The A.B.A. Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1968), Section 4.2, provides that a presentence report may be initiated prior to trial only if the defense consents, and:

> "(ii) adequate precautions are taken to assure that nothing disclosed by the presentence investigation comes to the attention of the prosecution, the court or the jury prior to adjudication of guilt."

Similarly, Rule 32(c) of the Federal Rules of Criminal Procedure provides that a presentence report:

> ". . . shall not be made to the court or its contents disclosed to anyone else unless the defendant has pleaded guilty or has been found guilty."

See also Evjen, Some Guide Lines in Preparing Presentence Reports, 37 F.R.D. 177, 178.

The importance of the values sought to be protected by these rules was emphasized by this Court in Gregg v. United States, 394 U.S. 489, 491-492 (1969) in its interpretation of Rule 32 when it said:

> ". . . the report must not, under any circumstances, be 'submitted to the court' before the defendant pleads guilty or is convicted. Submission of the report to the court before that point constitutes error of the clearest kind."

Indeed, this Court stated in Gregg that there was no justifiable reason for a trial court to receive such information prior to conviction and that consequently:

> "No trial judge, therefore, should examine the report while the jury is deliberating since he may be called upon to give further instructions or answer inquiries from the jury, in which event there would be the possibility of prejudice which Rule 32 intended to avoid.
> Gregg at 491-492.

As set forth in the Commentary to § 4.2 of the A.B.A. Standards: "The possibilities of prejudice are obvious." For this reason this Court's decision in Gregg has been interpreted to create a per se requirement of reversal where the trial court receives a copy of a presentence report prior to an adjudication of guilt. E.G., United States v. Montecalvo, 533 F. 2d 1110 (9th Cir. 1976); United States v. Park, 521 F. 2d 1381 (9th Cir. 1975).

Petitioner submits that the due process clause of the Fourteenth Amendment to the Constitution of the United States gives him the very same

protection against the unfairness of having a report of this nature disclosed to the judge and the state prosecutor as does Rule 32 of the Federal Rules of Criminal Procedure and that the error in disclosing this type of information is so fundamentally unfair as to require the application of the per se reversal rule. Indeed, given the great potential for prejudice and the difficulties of actually demonstrating that prejudice if it is denied by the state, Petitioner submits that in instances where a psychiatric report containing insights into the personality of an accused, along with incrimination information with respect to the crime of which he is charged is received and read by both the trial judge and the state prosecutor prior to trial, prejudice must be presumed. See Gregg v. United States, supra; United States v. Montecalvo, supra; and United States v. Park, supra.[24]

Though considerations of due process alone require that the petitioner be given a new trial, the facts and circumstances of this particular case are such that Petitioner can point to nine instances of actual or potential prejudice involving not only his right to due process, but several other constitutional rights.

First, the court ordered examination violated Petitioner's Fifth Amendment right to remain silent. Beyond peradventure of doubt neither the prosecutor nor the trial judge had the right to visit Petitioner in jail and compel him to reveal to them facts and information concerning the crime with which he had been charged. Petitioner's Fifth Amendment rights cannot be circumvented simply by the fact that it was the psychiatrist who asked the questions and reported the information back to the state.

Second, the mere existence of the psychiatrist's report "chilled" Petitioner's Sixth Amendment right to take the stand in his own behalf. Regardless of the ultimate resolution of the issue, it is apparent that if the

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[24] Similar standards are applied in analogous situations where the potential for prejudice is great, but so are the difficulties of proof. E.g., Glasser v. United States, 315 U.S. 60 (1942) (ineffective assistance of counsel because of conflict of interest); Remmer v. United States, 347 U.S. 227 (1954) (F.B.I. agent interviewed juror about possible jury tampering by a third party.)

Petitioner took the stand and made any statements inconsistent with those which were purported to be recorded in the evaluation, then the prosecutor could make a credible argument to the Court that under the rationale of Harris v. New York, 401 U.S. 222 (1971), he had the right to impeach Petitioner by use of the psychiatric evaluation.

Third, the Petitioner was understandably reluctant to talk with the psychiatrist concerning the facts underlying the crime with which he was charged. The effect this had upon Dr. Migdal was apparent:

> ". . . it seemed to this examiner that the patient was making a deliberate attempt to avoid discussion of his present offense by going off on tangents regarding his past history."
> Letter of February 25, 1975 (App. at 143)

Dr. Migdal characterized this as an attempt on Petitioner's part to "manipulate" the interview and concluded that such manipulation was one indicator that Petitioner was not mentally deficient (T. p. 668; App. at That "manipulation was described by Dr. Migdal as follows:

> ". . . I attempted to get the defendant to answer questions in relation to the crime [sic] which he had been charged, but he attempted to control the situation and manipulate it by avoiding discussion of the events by deliberately trying to concentrate on his past history and education . . . ."
> (T. p 665, App. at 119).

Had Doctor Midgal interviewed Petitioner after conviction rather than before, this "problem" would not have arisen and the conclusions of Dr. Migdal might have been different.

Fourth, the trial court was required to make numerous rulings whose results significantly affected the outcome of Petitioner's trial. The two most obvious questions involved the court's ruling upon whether or not to admit the statements Petitioner made to the police and whether or not the state had adduced sufficient evidence to establish the corpus delicti of the robbery offense. Had the statements been suppressed, it is apparent that the state could not have presented enough evidence to present the question

of guilt or innocence to the jury. If the court held that the state failed to establish the corpus delicti on the robbery offense, then the death penalty would have been precluded. In this context, the Court's knowledge of the contents of Dr. Migdal's report--which was not at all sympathetic to Petitioner--could have affected the court's judgment upon these close evidentiary issues. Petitioner submits that even the most conscientious Judge would be unable to completely realize the extent to which such report might affect his judgment upon these issues.

Fifth, for similar reasons, once the trial court had obtained this information, Petitioner was effectively prevented from exercising his right to waive jury trial and submit his case to the court. Rule 23 of the Ohio Rules of Criminal Procedure

Sixth, since the prosecutor indicated his belief that the psychological evaluation was consistent with information in the state's possession (T. p. 186; App. at 41) and since it was stated that the state did not believe all of the statements Petitioner had made to the police (T. pp 418-419; App 76-77) it is reasonable to surmise that this evaluation reinforced the prosecutor's confidence in his case, thus diminishing prospects that the state would engage in any meaningful plea bargaining.

Seventh, the type of information contained in the psychological report is normally information which a client shares only with his attorney and which is protected from discovery by the state through the attorney-client privilege and the Sixth Amendment to the Constitution of the United States. By revealing this type of information to the state, the court not only gave the prosecutor's office invaluable background information for making trial decisions, but also effectively undermined Petitioner's right to effective assistance of counsel.

Eighth, the trial court's action unjustifiably violated Petitioner's right to privacy. This court has found the roots of a right of privacy in the first amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969), the fourth and fifth amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United

States, 389 U.S. 347, 350 (1967); Boyd v. United States, 116 U.S. 616 (1886); see Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); in the ninth amendment, Id. at 486-87; and in the concept of liberty guaranteed by the fourteenth amendment, Meyer v. Nebraska, 262 U.S. 390, 399 (1923). This right is essentially the right to exist without governmental interference--to be able to erect certain sanctuaries, whether they be a home or an individual's mind, into which the government cannot intrude without consent. In essence, the right of privacy is "the right to be left alone . . . , Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) quoted with approval in Stanley v. Georgia, 394 U.S. 557, 564 (1969); a right which has been characterized as "a keystone of our legal philosophy" and as "one of the most cherished ideas of our form of democracy," State v. Siegel, 292 A. 2d 86, 88 (App. Md. 1972).

As was stated in Kaimowitz v. Department of Mental Health, Civil No. 73-19434-AW (Wayne County, Mich. Cir. Ct., July 10, 1973), summarized at 42 U.S.L.W. 2063 (July 31, 1973):

> "There is no privacy more deserving of constitutional protection than that of one's mind."
>
> "Intrusion into one's intellect, when one is involuntarily detained and subject to the control of institutional authorities, is an intrusion into one's constitutionally protected right of privacy. If one is not protected in his thoughts, behavior, personality and identity, then the right of privacy becomes meaningless."

Though conviction gives rise to a compelling state interest which would justify infringing upon an accused's right of privacy, no such interest exists prior to trial. Indeed, as this court recognized in Gregg v. United States, supra, at 491-492, there is no reason at all for a trial court to see pre-sentence reports prior to the time of conviction.

Thus, Petitioner seeks this Court's review of this issue with respect to his rights under the first, fourth, sixth, ninth and fourteenth

amendments to the United States Constitution. Given the importance of the issues raised and the unlikelihood that they will be addressed by the lower federal courts since Criminal Procedure Rule 32 provides a non-constitutional basis for resolving such questions, Petitioner respectfully submits that this is an issue worthy of certiorari.

III

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MERE RECITATION OF MIRANDA WARNINGS WITH A PURPORTED AFFIRMATIVE ANSWER AS TO THEIR MEANING COMPLIES WITH THE REQUIREMENT OF A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF THE RIGHT AGAINST SELF-INCRIMINATION, AND THE RIGHT TO ASSISTANCE OF COUNSEL BY PETITIONER WHO WAS A BORDERLINE RETARDED, HAD ONLY A SECOND-GRADE READING LEVEL AND WAS UNABLE TO READ THE MIRANDA WARNING CARD PRESENTED TO HIM.

The Petitioner was arrested along with another suspect, Haywood Manning, about 5:00 in the afternoon on January 9, 1975, by Akron police officers in connection with their investigation of the homicide of Joseph Eschack. Upon arrival at the station, Petitioner was placed in a small interrogation room where he remained for approximately 11 hours, until 5:00 a.m. the following morning (T. p. 232; App. at p. 46). During this time, Petitioner was interrogated by three Akron detectives: Cross, Goodwell, and Craig, and later by Summit County Prosecutor Zuch and Shoemaker (T. p. 222; App. at p. 44). At 6:30 p.m., approximately one hour after Petitioner was confined in this room, he gave an oral unrecorded statement implicating himself in the murder and robbery of Joseph Eschack. Prior to this confession, Petitioner testified at a suppression hearing that Detective Goodwell had told him that his friend (Manning) had implicated him and if he talked, the "court would be easy with you." (T. pp. 258, 260; App. at pp. 48, 49.) One of the other officers present (Detective Cross) didn't deny this statement that had been made by his fellow officer Goodwell. (T. p. 250; App. at p. 47.) Petitioner also testified that he had been denied the use of a telephone during interrogation. Petitioner was then shown a so-

called Miranda card and asked to read it. One of the detectives read verbatim from the card to Petitioner, and Petitioner said that yes, he understood. The officer assumed that Petitioner was able to read the card and understand his rights (T. p. 226; App. at p. 45). At the suppression hearing Petitioner told the trial court he could not read the card nor understand his rights prior to confessing. (T. p. 263, App. at p. 50.)

After this confession, Assistant County Prosecutor Shoemaker was summoned and after another reading of Miranda rights to Petitioner, he made a recorded confession at approximately 8:25 p.m. Due to difficulty in this tape recording device used, another recorded statement was made one and a half hours later at 10:40 p.m. Petitioner moved to suppress these out-of-court statements from introduction at trial based upon the failure of the police to comply with this court's ruling in Miranda v. Arizona, 384 U.S. 436 (1966) and that the confession was involuntarily made and based upon coercion. Immediately prior to trial on January 17, 1975, the court overruled the motion to suppress.

In Miranda v. Arizona, supra, this court recognized that the custodial "interrogation environment" in which petitioner was held incommunicado for 11 hours is created for no other purpose than to "subjugate" the accused "to the will of the examiner," 384 U.S. at 457. (See Justice Marshall Dissent, Michigan v. Mosley, 965.) In order to protect the accused's rights under both the Sixth and Fifth Amendments, this court developed procedural safeguards to counteract the coercive pressures of the interrogations process, the so-called Miranda warning "to serve to make the individual more acutely aware that he is faced with a phase of the adversary system," 434 U.S. 469. This court held further, that the giving of the warnings is not a "preliminary ritual to existing methods of interrogation," but that under the Fifth Amendment, prior to answering the interrogator's questions, the defendant must make a knowing, voluntary, and intelligent waiver of his constitutional rights, 384 U.S. at 476. Petitioner contends that while he was given his recited Miranda warning, he did not make a knowing, intelligent, and voluntary waiver of his rights.

A.

Petitioner would ask this Honorable Court to review the case to reassert the teachings of Miranda which require not only the warning itself but a waiver of the rights delineated in the warning, by the accused. Miranda, supra, 384 U.S. at 476. The purpose of Miranda warnings are as prophylactic means of ensuring the safeguards provided in the Fifth Amendment. See Doyle v. Ohio, 426 U.S. 610, 617 (1976); Michigan v. Tucker, 417 U.S. 433, 443, 444 (1974). Where the accused is unrepresented by counsel, as the Petitioner was at the time of his custodial interrogation it is clear that the state bears a "heavy burden" in demonstrating a knowing and intelligent waiver on the part of the accused of his privilege against self-incrimination, Miranda, supra, 384 U.S. at 475. The standard to be applied to determine whether a waiver has taken place is equally clear under this court's decisions to be "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Schneckloth v. Bustamonte, 412 U.S. 218, 240 (1973).

The Ohio Supreme Court in Petitioner's case disregarded the concept of "waiver" embodied in the Miranda decision finding that police had complied with Miranda by reading the warnings to Petitioner and having an affirmative response from him that he understood, 47 Ohio St. 2d 31, 39 (App. at p. 5). The Ohio Supreme Court, just as the police officers who interrogated Petitioner "assumed" he understood his rights (T. p. 226) despite substantial evidence to the contrary.[25] The Supreme Court of Ohio

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[25] At his trial the following evidence was testified to concerning his mental capacities:

> Petitioner has an IQ of 76 and is classified borderline mentally retarded (T. p. 635, App. infra at p. 106). Petitioner did graduate from high school but as an "educable mentally retarded" and was 187 out of a class of 188 (T. p. 658, App. infra at p. 116). Shortly before graduation Petitioner was considered functionally illiterate by his teachers (T. p. 659; App. infra at p. 117). In the opinion of one of Petitioner's special education teachers, he was incapable of understanding words such as "waive your rights," (T. p. 627, App. infra at p. 101).

has made the Miranda warnings merely the preliminary ritual which this Court initially warned against in the Miranda, supra decision.

B.

Petitioner would also request this court to review his case based upon the admission of his confession in violation of his rights under the due process clause of the Fourteenth Amendment. In determining the standard by which confessions must pass constitutional muster, this Honorable Court has consistently held:

> ". . . The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." Culombe v. Connecticut, supra, 367 U.S., at 602, 81 S. Ct., at 1879."

> "In determining whether a defendat's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, e.g., Haley v. Ohio, 332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224; his lack of education, e.g., Payne v. Arkansas, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975; or his low intelligence, e.g., Fikes v. Alabama, 352 U.S. 191, 77 S. Ct. 281, 1 L. Ed. 2d 246; the lack of any advice to the accused of his constitutional rights, e.g., Davis v. North Carolina, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895; . . . Schneckloth v. Bustamonte, 412 U.S. 223 at 266, 227, (1973).

The Petitioner's low intelligence, lack of education, the fact that the detectives assumed he understood his Miranda rights without explaining them to him, and that he was denied access to a telephone during his 11 hours of interrogation belie the contention that his confession was "essentially a free and unconstrained choice." This Court has recently reemphasized that

besides any constitutional questions concerning Miranda violations, the issue still remains concerning the voluntariness of confession, Beckwith v. United States, ___ U.S. ___, 96 S. Ct. 1612 (1976). In Beckwith, supra, this Court held concerning voluntariness of a confession:

> ". . . When such a claim is raised, it is the duty of an appellate court, including this Court, "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." Davis v. North Carolina, 384 U.S. 737, 741-742, 86 S. Ct. 1761, 1764, 16 L. Ed. 2d 895, 898 (1966). Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive. Frazier v. Cupp, 394 U.S. 731, 739, 89 S. Ct. 1420, 1424, 22 L. Ed. 2d 684, 693 (1969); Davis v. North Carolina, supra, 384 U.S., at 740-741, 86 S. Ct., at 1763-64, 16 L. Ed. 2d, at 897-98 (1966). Id. at 96 S. Ct. 1617."

Petitioner will admit that this promise of leniency alone will not render his confession involuntary, see Frazier v. Cupp, 394 U.S. 731 (1969), however, this false promise of leniency by the detective prior to giving of Miranda warning cannot be viewed in a vacuum but must be viewed in totality of circumstances. Schneckloth v. Bustamonte, supra. This court observed in Miranda, supra, that isolation of the accused as petitioner during custodial interrogation is to undermine the accused's will to resist and that:

> ". . . [W]hen normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights." Miranda v. Arizona, 384 U.S. at 455, 86 S. Ct. at 1617. See also State v. Watson, 457 F. 2d 197 (N.M. 1971)."

This Court has held further that the due process considerations excluding involuntary confessions rests not on the truthfulness of the confession, but on the improper methods used by the police in obtaining that

confession. Rogers v. Richmond, 365 U.S. 534 (1961). Petitioner submits, based on his acute susceptibility to the police tactics employed in his case, that his confession was involuntary, coerced, and not a product of his free will.

C.

Alternatively, Petitioner would ask this Honorable Court to grant certiorari of his case to reaffirm the principle recognized by this Court and others that individuals of limited mental and educational ability, as Petitioner, may be incapable of knowingly and intelligently waiving constitutional rights even though they were previously warned of those rights by police. Cooper v. Griffin, 455 Fed. 1142 (5th Cir. 1972); Sims v. Georgia, 389 U.S. 404 (1967); United States ex rel. Lynch v. Fay, 184 F. Supp. 277 (S.D. W.N.Y.); United States ex rel. Simon v. Maroney, 228 F. Supp. (W.D. Pa. 1964). Although Petitioner is an adult by chronological age, based upon his mental and educational deficiencies, he is the same as a juvenile. This Court has ruled that youth, low intelligence, and lack of education are salient factors in determining whether there is a waiver of constitutional rights. This Court has held that such a person is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and is unable to know how to protect his own interests or how to get the benefits of his constitutional rights. Gallergos v. Colorado, 370 U.S. at 54, Reh. Den. 370 U.S. 965 (1962); Haley v. Ohio, 356 U.S. 560 (1948); Fikes v. Alabama, 352 U.S. 195 (1957).

In applying the teachings of this Court in Miranda, supra, to persons of decidedly limited mental ability, as Petitioner, courts have held that the state has failed to meet its heavy burden of proving a knowing and intelligent waiver by the accused simply by demonstrating that the Miranda warnings were given without further inquiry as to whether they were understood. See Garret v. State, 351 N.E. 2d 30 (Ind. 1976); Commonwealth v. Jones, 328 A. 2d 828 (Penn. 1974); United States v. Blocker, 354 F. Supp.

1195, 1200-1202 (D.D.C. 1973); Commonwealth v. Daniels, 321 N.E. 2d 822 (Mass. 1975). Thus, Petitioner maintains that the state has not met its burden in his case by statements of the detectives that they "assumed" Petitioner could read the Miranda warning card and understand his rights after they recited them to him in light of other testimony that Petitioner was unable to comprehend those rights without further explanation. See Commonwealth v. Daniels, supra.

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT DENIED PETITIONER HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS BY ALLOWING PREJUDICIAL HEARSAY STATEMENTS AT PETITIONER'S TRIAL AND THEN PRECLUDING DEFENSE COUNSEL FROM COMMENTING TO THE JURY UPON THE FAILURE OF THE HEARSAY DECLARANT TO TESTIFY AT TRIAL.

During the course of Petitioner's trial the state called Detective Russell Cross who was present during the time of Petitioner's purported confession. Detective Cross' testimony laid the foundation for the introduction of the first of three recorded statements where Petitioner implicated himself in the murder of Mr. Eshack. Over the timely objection of defense counsel, the Court allowed the playing of Petitioner's recorded statement to the jury (T. p. 343; App. at p. 64). After the playing of the recording the state was allowed to elicit hearsay testimony from Detective Cross concerning the out-of-court statements of one individual who did not testify at trial, Haywood Manning (T. pp. 428-432; App. infra at pp. 66-67). The statement of the out-of-court declarant, Haywood Manning, was that Petitioner confessed to him immediately after he had robbed and shot the victim, Joseph Eshack. Manning's hearsay statement also linked Petitioner with the murder weapon. Dectective Cross testified further that his investigation singled out the Petitioner as the murderer based upon his (Cross') conversations

with Butch DeBruce, who allegedly loaned Petitioner the murder weapon. Neither DeBruce nor Harris testified at trial.

After the defense rested at trial, the Respondent made a motion pursuant to Ohio Criminal Rule 16(B)(4)[26] to preclude Petitioner from commenting to the jury on Respondent's failure to call any witness whose name appeared on the witness list the state had given to Petitioner's counsel. Based on this section of Ohio Criminal Rules, the trial judge granted the motion and precluded Petitioner from commenting to the jury on Manning's and DeBruce's failure to appear at trial (T. p. 497; App. at p. 79).

Upon review, the Supreme Court of Ohio recognized that the trial judge was wrong in allowing the introduction of the hearsay statement of Manning, holding:

> "Throughout the testimony of detective Cross, the state introduced hearsay testimony of Hay wood Manning and Butch DeBruce. The state brought the names of these people to the attention of the jury. The court, however, refused to allow defense counsel to mention the name Manning in final argument. In so doing, the appellant argues, the lower court erred."
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> "Aside from Edward's confession and the statements attributed to DeBruce, Manning's testimony and credibility were relevant in connecting Edwards with the murder weapon."
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> 49 Ohio St. 2d 43, 44 (App. infra at 7, 8.)

The Supreme Court held further, however, that since the procedural rule was clear and applicable to Petitioner's case, the trial court was correct in precluding defense counsel from raising doubt to the jury concerning the uncalled witnesses (49 Ohio St. 2d at 44; App. at p. 5).

Petitioner admits to the interpretation of Ohio Criminal Rule 16(B)(4) as decided by the Supreme Court of Ohio, but he respectfully

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[26] Ohio Criminal Rule 16(B)(4) provides:

> "The fact that a witness' name is on a list furnished under subsection (B)(1)(b) and (f), and that such witness is not called shall not be commented on at trial."

contends that in his case, where testimony of uncalled witnesses is allowed through hearsay testimony, to refuse defense counsel an opportunity to comment in closing argument is violative of Petitioner's Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to due process of law. Only last term this Honorable Court recognized that part and parcel of effective assistance of counsel is the right to make a closing summation to the trier of fact. Herring v. New York, 422 U.S. 853 (1976). Petitioner submits that to allow testimony of out-of-court declarants to be introduced at trial and then to prevent comment on such testimony in closing argument is to deny the ability of his counsel to make an effective closing argument. This prevents the defense from exercising the constitutional right to participate fully and fairly in the fact-finding process. See Herring, supra, 422 U.S. 853, 862.

Alternatively, this Court has long held that state procedural rules cannot be upheld where they act under the facts of the case to deny the accused a fair trial in violation of the due process clause of the Fourteenth Amendment, Chambers v. Mississippi, 410 U.S. 284 (1973); Davis v. Alaska, 415 U.S. 308 (1973). In Chambers v. Mississippi, supra, this Court stated that the right of a defendant in a criminal case to confront and examine the witnesses against him is an essential part of due process. Petitioner submits that to admit key testimony of out-of-court declarants at his trial, and then to prevent his counsel from questioning the source of this testimony in his jury summation is to violate Petitioner's right of confrontation and his right to a fair trial under the due process clause of the Fourteenth Amendment.

V.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S INSTRUCTIONS THAT IF THE JURY FOUND CERTAIN FACTS TO BE TRUE THEN "A PRESUMPTION TO KILL MUST BE INFERRED" VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The due process clause of the Fourteenth Amendment and the right to a jury trial guaranteed by the Sixth Amendment coalesce to require the state to prove to the satisfaction of a jury each and every element of the offense beyond a reasonable doubt. Duncan v. Louisiana, 391 U.S. 145 (1968); Mullaney v. Wilbur, 421 U.S. 684 (1975). Because conviction for aggravated murder under Ohio Revised Code Section 2903.01 requires that the action of the accused be committed "purposely," the determination of the "intent of the accused is an ingredient to the crime charged" and "its existence is a question of fact which must be submitted to the jury." Morisette v. United States, 342 U.S. 246, 274 (1952). While such intent may be inferred, the constitution requires that such inference be permissive and not conclusive. United States v. Gainey, 380 U.S. 63, 70 (1965).

> "In fact, not even a undisputed fact, may be determined by the judge. The plea of not guilty puts all in the issue, even the most patent truth: In our federal system, the trial court may never instruct a verdict in whole or in part."[27]
> United States v. Musgrave, 444 F. 2d 755, 762 (5th Circuit 1971).

For this reason "it follows that the trial court may not withdraw or prejudge the issue by [any] instruction that the law raises a presumption of intent from an act." Morisette, supra.

In the case at bar, the trial court violated these standards by instructing the jury as follows:

> "If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the presumption to kill must be inferred from the use of said weapon," (T. p. 557.)
> (Emphasis added.)

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[27] The trial court's instructions at the case at bar, by effectively reducing the jury's determination on the issue of intent made what was in fact a partially directed verdict.

By virtue of this instruction the trial court created a conclusive presumption moving from the state its burden of proof upon the issue, intent, and denying the jury the right to reach a finding of fact upon that issue.

Consequently, the court's instructions denied Petitioner his Sixth Amendment right to have the facts determined by the jury and due process right to require the state to prove each and every element of the offense beyond a reasonable doubt. Because of the importance of these constitutional rights, and because of the failure of the Ohio courts to adequately consider these substantial issues, the Defendant has no choice but to petition this Court for the review of the meaning of these constitutional provisions.

CONCLUSION

Last term, this Court reviewed the capital-sentencing systems in five states under the scrutiny of the Eighth and Fourteenth Amendments. This Court held that the determination of whether a particular state has retained the death penalty consistent with the Constitution is made on a state-by-state basis. See Gregg, supra, at 428 U.S. 195. Based upon the questions presented in regard to the constitutionality of Ohio's death penalty statute, as well as the other constitutional questions set forth, Petitioner would pray that his petition for a writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Petition for a Writ of Certiorari and the Appendix thereto to Counsel for the Respondent, Mr. Stephen M. Gabalac, Summit County Prosecutor, City-County Safety Building, Akron, Ohio 44308 on this 27th day of May, 1977.

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